

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1292

To be argued by
LEE RICHARDS

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1292

UNITED STATES OF AMERICA,

Appellee,

—v.—

GERALDO MARTINEZ,

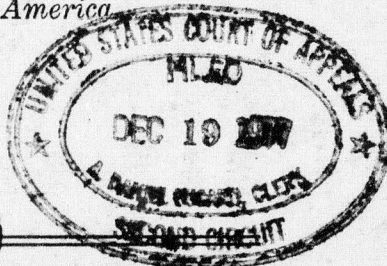
Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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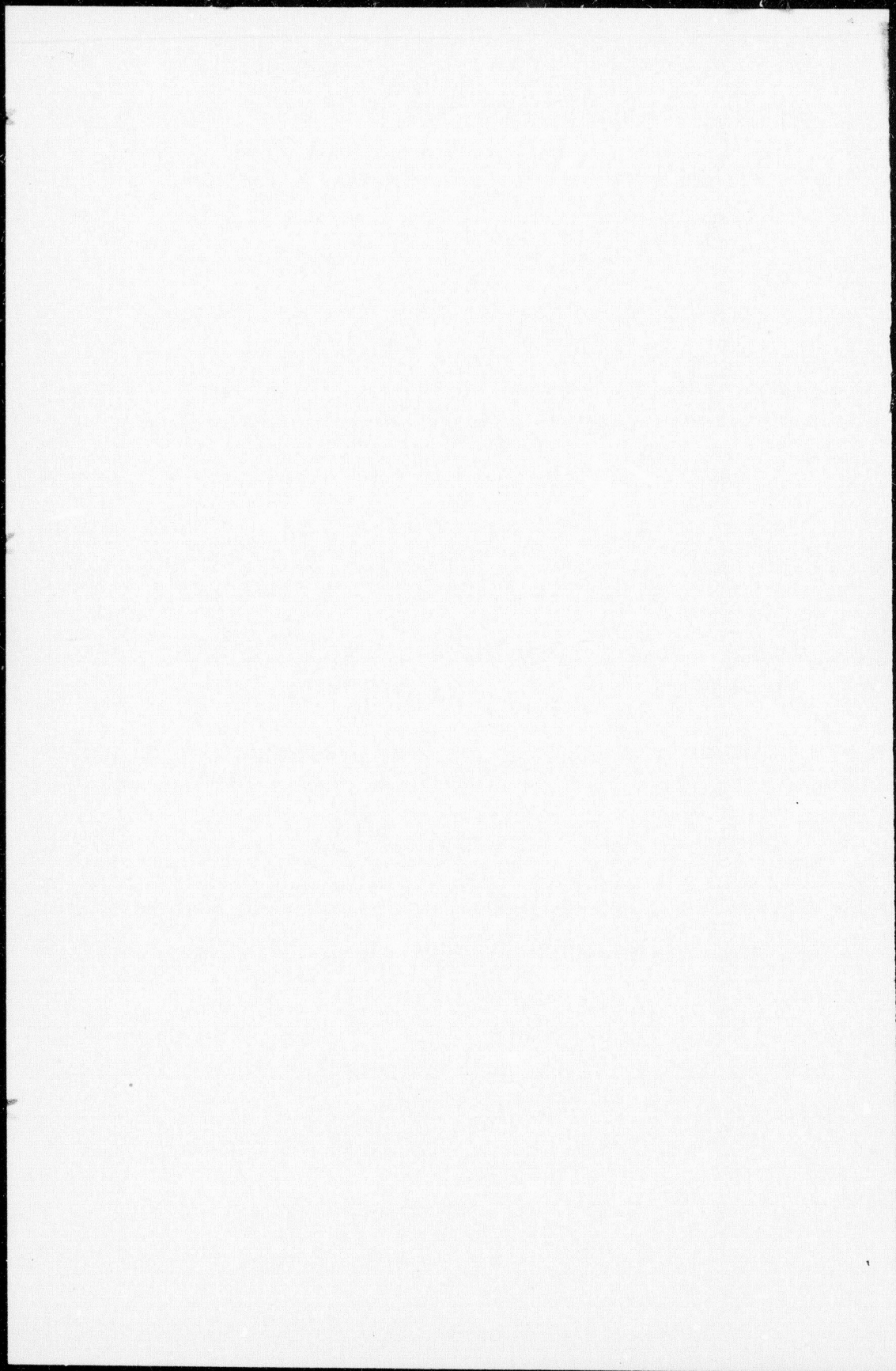


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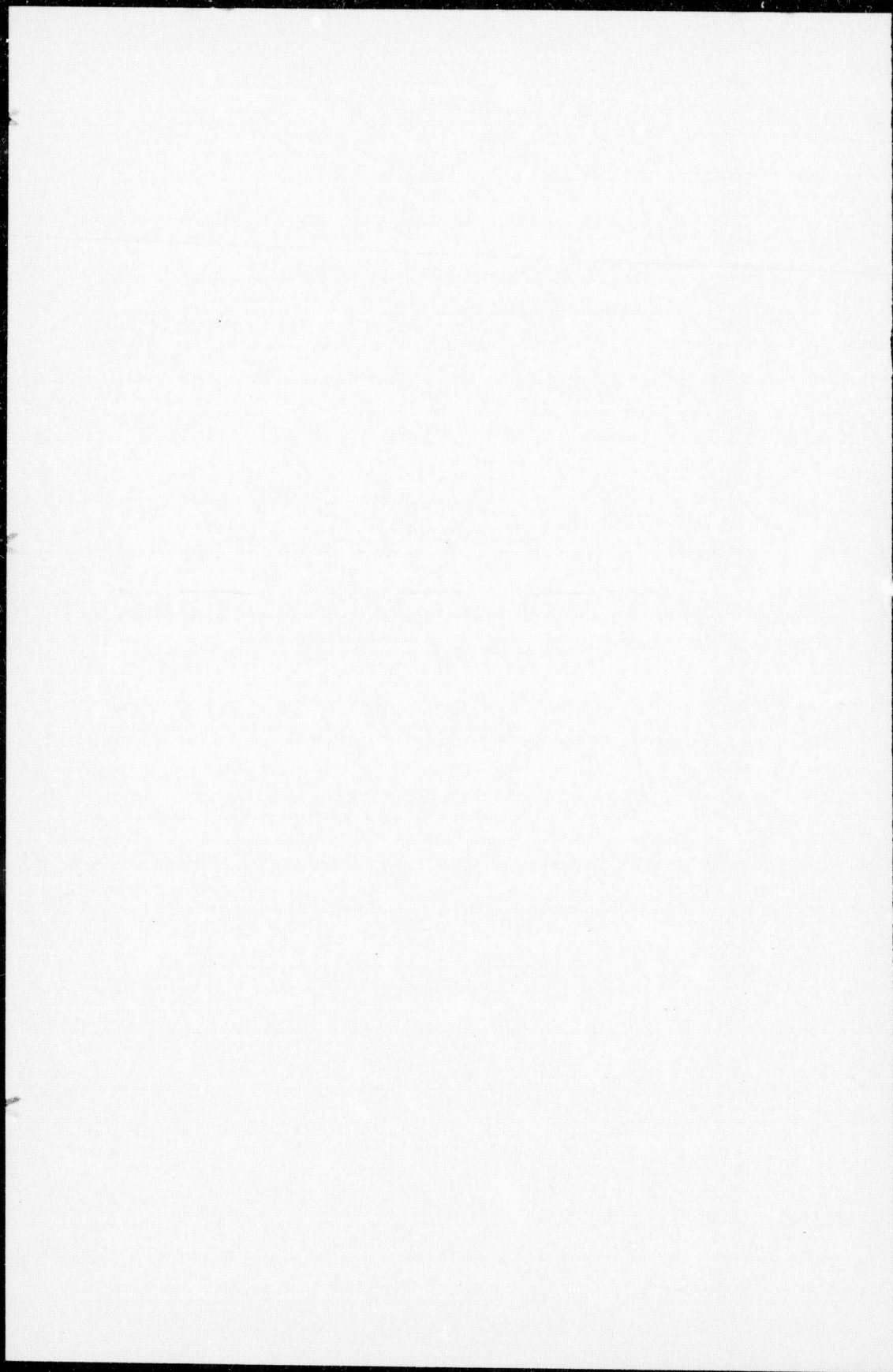
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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1292

UNITED STATES OF AMERICA,

Appellee,

—v.—

GERALDO MARTINEZ,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Geraldo Martinez appeals from a judgment of conviction entered on June 15, 1977 in the United States District Court for the Southern District of New York after a two-day jury trial before the Honorable Henry F. Werker, United States District Judge.

Indictment 76 Cr. 766 was filed on August 17, 1976, and charged Martinez with two counts of distribution and possession with intent to distribute cocaine in violation of Title 21 USC, Sections 812, 841(a)(1) and 841(b)(1)(A). Trial of Martinez began on the afternoon of May 2, 1977 and ended the morning of May 4, 1977. On June 15, 1977 Judge Werker sentenced Martinez to two concurrent terms of imprisonment of ten years plus a five year special parole term. Martinez was remanded.

Statement of Facts

The Government's Case

On two different occasions in the early summer of 1974 Geraldo Martinez sold one ounce of cocaine to an undercover agent of the Drug Enforcement Agency ("DEA") named Juan Rodriguez. Each transaction was arranged through an informant named Paul Wolfert and was observed by one or more agents of the DEA.

At trial the Government presented the testimony of Wolfert, Rodriguez, four other DEA agents, a DEA chemist and a telephone company employee. That testimony showed that Martinez and Wolfert first met on June 14, 1974 at the New Jersey house of a mutual acquaintance. (Tr. 26).^{*} At that first meeting Martinez told Wolfert he could supply cocaine in "any quantity that was needed" by Wolfert or anyone else. (Tr. 27). Wolfert took Martinez's telephone number and noted the make and license number of his car. (Tr. 27).

Two days after their first meeting Wolfert and Martinez had a telephone conversation. (Tr. 27-28). In that conversation a transaction for an ounce of cocaine was arranged, though Martinez expressed a desire to deal in larger quantities. (Tr. 28).

The transaction was carried out on June 18, 1974. In the evening Martinez came to the lobby of Wolfert's building and showed him an oblong package containing what later proved to be cocaine. (Tr. 28-29; GX 1). Martinez and Wolfert walked to Rodney's Bar on 13th Street in Manhattan where they met undercover Agent

^{*} References to "Tr." are to pages of the trial transcript. Government exhibits are denoted "GX."

Rodriguez. (Tr. 29-30). The three men spoke briefly at the bar, and the conversation was witnessed by Agent Rose who was conducting surveillance. (Tr. 30-31). Martinez acknowledged that the cocaine was his but insisted that the transaction go through Wolfert. (Tr. 48). He also said that the cocaine was good, that it could be "cut" three times, and that he could supply Rodriguez with up to a half of a kilogram. (Tr. 49).

Martinez, Wolfert and Rodriguez moved to a dining area in the rear of Rodney's. The package of cocaine was passed under the table, first to Wolfert and from Wolfert to Rodriguez. (Tr. 32, 51). Rodriguez paid Martinez \$900 and Wolfert counted the money in Martinez's presence. (Tr. 31-32, 53). As Wolfert and Martinez left the bar they were observed by surveillance Agents Rose, Tuerack, and Sweikert. (Tr. 73-74, 101, *et seq.*, 110, *et seq.*). Martinez drove off in a car bearing the same license number he had given previously to Wolfert. (Tr. 104).

The second transaction took place on July 1, 1974 at a bar called the Under The Stairs Lounge, and was the subject of Count Two of the indictment. (Tr. 34, 53). Martinez and Rodriguez met three times in that bar that evening. When they first met Martinez said he did not have the cocaine but would have it in an hour. (Tr. 55-56). After Martinez and the undercover Agent Rodriguez discussed the first transaction, Wolfert arrived and Martinez left the bar. (Tr. 55-57). He returned about an hour later with two other unidentified men and met with Rodriguez and Wolfert in the men's room. (Tr. 58). Martinez showed Rodriguez a sample of cocaine and said the price of the anticipated ounce transaction would be \$1,000. (Tr. 58-59). Martinez left the bar again, accompanied by the two men, and returned in 45 minutes. (Tr. 59). Again he took Rodriguez and Wolfert to the men's room. Martinez gave Rodriguez a clear plastic bag con-

taining cocaine * and Rodriguez paid \$900, promising to pay Martinez \$100 in the future. (Tr. 60-61). Before he left the bar, Martinez wrote his telephone number on a napkin and handed it to Rodriguez. (Tr. 62-63). It was the same number Martinez had given to Wolfert at their first meeting. (Tr. 62-63).**

An employee of New Jersey Bell Telephone, Gail Levy, testified that telephone records showed that the telephone number Martinez gave to both Wolfert and Martinez was used at the time by a Mrs. Williams who lived at 215 Shepard Avenue, Teaneck, New Jersey. Between the two drug transactions agent Rose had seen Martinez's car parked at the Shepard Avenue address. (Tr. 77-78; GX 4).

The Defense Case

Martinez took the stand as the only defense witness. (Tr. 126). He testified that he had gone swimming on June 18, 1974, the date of the first transaction, and spent the night in Englewood, New Jersey. (Tr. 127). He also testified that on July 1, 1974, the date of the second transaction, he was visiting a friend on 111th Street between Seventh and St. Nicholas in Manhattan. (Tr. 128-130). He denied ever having seen the informant Wolfert, the undercover agent Rodriguez or the surveillance agents Rose or Ridler. (Tr. 130-31). On cross-examina-

* Martinez's movements in the bar were observed by Agent Tuerack and his movements outside the bar were observed by Agent Ridler. (Tr. 93 *et seq.*, 113 *et seq.*).

** A DEA chemist, Jack Fasanello, testified that results of tests he had made on the packages Martinez sold to Agent Rodriguez showed that they contained cocaine. (Tr. 80 *et seq.*, GX 1, 2). He was cross-examined at some length about the fact that one of the exhibits had turned brown. (Tr. 86 *et seq.*; GX 2).

tion he claimed that on June 18, 1973 he had given his name to Mrs. Williams so she could register her car in his name. (Tr. 133).^{*} He claimed to have known Mrs. Williams for only two weeks in June of 1973. (Tr. 131-32).

ARGUMENT

POINT I

The Court Properly Charged The Jury With Respect To The Defendant's Statements.

Martinez's initial argument is that the District Court improperly charged the jury that the defendant's "admissions" or "incriminating statements" made at the time of the offense "are among the most effectual proofs in the law" and "the strongest evidence . . . of the facts stated in the admissions." ^{**} He contends that this brief portion of the charge somehow removed the alibi defense from the jury's consideration.

^{*} The registration card for the car was Government's Exhibit 5. It showed Martinez's name and the 219 Shepard Avenue address, and was for a 1974 vehicle.

^{**} Judge Werker first observed:

You have heard evidence of statements made by the defendant on two different occasions concerning the sale of cocaine. (Tr. 177).

After instructing the jury on the law of aiding and abetting, Judge Werker gave the following charge:

The admissions of the defendant or the incriminating statements made or acts done by the defendant outside of court are among the most effectual proofs in the law and constitute the strongest evidence against the party making it that can be given of the facts stated in the admissions. Accordingly, you are entitled to give great weight to the defendant's admissions in this case. (Tr. 178).

When the charge is read as a whole, Martinez's argument that the above-quoted portion of the charge removed the alibi defense from the jury's consideration must fail.* Following the language defendant contends was error, the District Court explicitly told the jury that the defendant had offered an alibi defense, and that if the jury had a reasonable doubt as to whether the defendant was present at the transactions in question they *must* acquit. (Tr. 180-181). Judge Werker also instructed the jury that the defendant had no duty to produce any evidence (Tr. 181), and that the Government had to establish each element of the offense beyond a reasonable doubt. (Tr. 175, 182, 189). The District Court initially had reminded the jury that they were the sole triers of the facts and that their recollection of the facts, not the Court's or counsel's controlled. (Tr. 169). Judge Werker also carefully instructed them that his reaction to the evidence was "completely immaterial and irrelevant." (Tr. 172). Consequently the jury was clearly informed of Martinez's alibi defense and nothing in the Court's instructions implied that the jury was not to consider the alibi defense.

In the portion of the charge Martinez criticizes Judge Werker was referring the jury to evidence of statements Martinez had made during the two transactions in question. The District Court was simply commenting that statements made during the course of the alleged criminal activity are highly relevant in determining a defendant's guilt or innocence. As a matter of plain common sense this is necessarily true because in determining whether the Government has established each element of the offense beyond a reasonable doubt statements made by the de-

* It is well settled that the trial court's charge should be read as a whole. *United States v. Hanlon*, 548 F.2d 1096 (2d Cir. 1977); *United States v. Guillette*, 547 F.2d 743, 750 (2d Cir. 1976); *United States v. Magnano*, 543 F.2d 431, 435 (2d Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977); see generally *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973).

fendant during the crime have enormous probative value. For example, statements made by the defendant at the time the controlled substance is given to the undercover agent are highly relevant in deciding whether the defendant acted with the requisite knowledge and intent; the words uttered by the defendant necessarily reflect his state of mind. Such comments on the weight of certain evidence are well within the discretion of the trial judge. *United States v. Lombardi*, 550 F.2d 827, 829 (2d Cir. 1977); *United States v. Natale*, 526 F.2d 1160, 1166-69 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976); *United States v. Dozier*, 522 F.2d 224, 227 (2d Cir. 1975); *United States v. DeLaMotte*, 434 F.2d 289, 291-92 (2d Cir. 1970), *cert. denied*, 401 U.S. 921 (1971); *Cf. United States v. Cheung Kin Ping*, 555 F.2d 1069 (2d Cir. 1977); *United States v. Tourine*, 428 F.2d 865, 869-70 (2d Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971).*

Martinez's heavy reliance on this Court's decision in *United States v. Grunberger*, 431 F.2d 1062, 1069 (2d Cir. 1970) is misplaced. In *Grunberger* this Court ordered a new trial because of the totality of error which occurred during the trial of that "particular case, where the factual issues were close, and the Government's case was not particularly strong . . ." One problem related to the trial court's jury instruction that a statement by the defendant during a search of his home was an admission. The defendant acknowledged that he had made the statement in question—" [t]his is illegal." He contended that when he spoke these words he was posing a question to the agent—" [t]his is illegal?" Under the defendant's interpretation the statement was not an admission. However,

* Indeed, it has been held that charges which directly express the Court's opinion on a contested element of the crime in question or even misdefine the elements are not error. *United States v. Natale*, *supra*; *Cf. United States v. Monteill*, 526 F.2d 1008 (2d Cir. 1975).

the Government argued that the defendant uttered the remark as a declarative statement, and thus the statement was an admission. The trial court simply told the jury that the statement was an admission. Since a serious dispute existed concerning the meaning of these words (and not whether they were actually uttered), this Court concluded that such an instruction usurped the jury's function to determine the import of the defendant's statement. *United States v. Grunberger*, *supra*, 431 F.2d at 1069.

In the instant case Martinez did not dispute the meaning of the statements; obviously if Martinez made the statements they were admissions. Unlike the defendant in *United States v. Grunberger*, *supra*, Martinez vigorously denied that he made the statements at all.* Moreover, contrary to what this Court concluded was a close case in *Grunberger*, the evidence of Martinez's guilt was overwhelming—an undercover agent and an informant identified Martinez as the individual from whom they purchased cocaine, and several surveillance agents and documentary evidence corroborated that testimony.

* In addition, this Court found the error in *Grunberger* reversible only when combined with several other errors discussed at greater length in the opinion.

Martinez's reliance on *United States v. Barry*, 518 F.2d 342 (2d Cir. 1975) is similarly misplaced.

In *Barry*, the Court failed to instruct the jury that it should give a *confession* what weight it felt the confession deserved under the circumstances. That instruction is mandated by 18 U.S.C. § 3501(a) where the defendant contested the *voluntariness* of a confession. Here the Court was not instructing the jury about any confessions (as there were none) and the voluntariness of the statements was never placed in issue. See *United States v. Lucchetti*, 533 F.2d 28, 38-40 (2d Cir. 1976). Martinez would apparently have this Court apply § 3501(a) and all its attendant procedural requirements to any case in which admissions by the defendant made during the course of the commission of the crime are offered into evidence. That is clearly not the import of *Barry* or § 3501(a).

Finally, this is hardly a case where the disputed language in the District Court's charge could have possibly prejudiced the defendant. The defendant offered an alibi defense. As to the statements the Government claimed were made by the person selling cocaine during the course of the crime, Martinez claimed that he was not the person who made the statements because he was somewhere else. In view of the alibi defense, Martinez made no claim that the statements lacked probative value, that the statements were not made by someone, or that the statements had any meaning other than that suggested by the Government.* Judge Werker's charge to the jury on the alibi defense fairly and properly set out Martinez's defense. The disputed language simply told the jury that statements made during the course of the crime are significant.

POINT II

The Defendant Was Not Denied the Effective Assistance of Counsel.

Martinez claims that he was denied his Sixth Amendment right to the effective assistance of counsel because his trial counsel failed to make certain pretrial motions, failed to object to the Court's charge, and failed to engage in extended cross-examination. None of these alleged oversights, viewed in isolation or together, constitutes ineffective assistance of counsel.

This Court has recently reiterated the standard for determining whether a defendant received effective assistance of counsel:

“[U]nless the purported representation by counsel was such as to make the trial *a farce and a mock-*

* Indeed, in the face of the testimony from both undercover agent Rodriguez and the informant Wolfert, Martinez would have been hard pressed to have advanced any of these claims. See *United States v. Lucchetti*, *supra*, 533 F.2d at 38-40.

ery of justice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice . . . A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice. . . ." (Emphasis added).

United States v. Bubar, Dkt. No. 76-1140, slip op. 4519, 4536 (2d Cir. June 30, 1977), quoting *Rickenbacker v. Warden*, 550 F.2d 62, 65-66 (2d Cir. 1976) and *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950). See also *LiPuma v. Commissioner, Department of Corrections*, 560 F.2d 84, 88-91 (2d Cir. 1977).*

Martinez argues that he received ineffective assistance of counsel when trial counsel failed to move to dismiss the indictment for violation of Martinez's Sixth Amendment right to a speedy trial and because the Government violated the Southern District of New York Plan for the Prompt Disposition of Criminal Cases (hereafter "the Plan").** Since the rights created by both the Sixth Amendment and the Plan were not raised below and are therefore waived, *United States v. Housand*,

* This Court has emphatically rejected the invitation urged by Martinez to discard this standard and to adopt a more lenient test. (Br. 20). *LiPuma v. Commissioner, Department of Corrections*, *supra*, 560 F.2d at 90-91; *Rickenbacker v. Warden*, *supra*, 550 F.2d at 65-66 (2d Cir. 1976); *United States v. Yanishefsky*, 500 F.2d 1327, 1333 n.2 (2d Cir. 1974).

** Martinez makes no claim that the Speedy Trial Act was violated or overlooked by his attorney. 18 U.S.C. 3161 *et seq.* Of course, under the Act the appropriate remedy for delay of the kind asserted here would not be dismissal of the indictment. 18 U.S.C. § 3163(c); *United States v. Cordova*, 537 F.2d 1073, 1075 n.1 (9th Cir. 1976), *cert. denied*, — U.S. — (1977). Indeed this Court has held that the District Court lacks the discretion to dismiss an indictment for violation of the Act. *United States v. Carini*, Dkt. No. 77-1167, slip op. 5599 (2d Cir. Aug. 30, 1977).

550 F.2d 818 (2d Cir. 1977); 1976 Plan, Rule 11(c), he asserts those rights by claiming that his trial counsel's failure to raise the issue amounted to ineffective assistance of counsel. This backdoor method of raising a claim which has been waived should be rejected.

Based on the record thus far developed in the District Court the following sequence of events apparently occurred: a complaint was filed on April 9, 1975 in the Southern District of New York charging Martinez with one sale of an ounce of cocaine on July 1, 1974. Martinez was arrested on April 29, 1975 in the Northern District of Illinois. Removal hearings were conducted in Illinois, and on May 21, 1975 Martinez was ordered removed to the Southern District of New York. On July 14, 1975 the complaint was dismissed on motion by the Government. Martinez was indicted on August 17, 1976 for two sales of cocaine. He failed to appear on August 26, 1976 for arraignment. Based on an agreement between the defendant and the Government, a not guilty plea was entered and the case was assigned to Judge Werker. On December 15, 1976 the defendant made his first appearance before the District Court and an attorney was assigned. Apparently before December 15, 1976 the defendant did not have an attorney. A pretrial conference was held on January 11, 1977 at which time a possible trial date was discussed.* On February 4, 1977 the Government filed a notice of readiness for trial. On May 2, 1977 the trial began; the defendant was produced for trial pursuant to a writ of habeas corpus ad prosequendum.

* At the pretrial hearing on January 11, 1977 the District Court informed counsel for both the Government and the defendant that the Court believed that the time from August 26, 1977 until December 15, 1977, the date the defendant appeared without counsel, was excludable in determining the time limits for a speedy trial.

Based on these facts Martinez now claims that trial counsel could have established a clear violation of the District Court's speedy trial plan. The question on appeal is not whether Martinez may have been able to make a meritorious motion to dismiss for violation of the speedy trial plan. The issue is whether failure to make the motion in a situation where the defendant for tactical reasons wanted a delay in his trial, and where the chances of securing a dismissal of even one count of the indictment were insubstantial, rendered the proceedings a "farce and mockery of justice."

In the absence of a detailed record it is impossible to determine authoritatively the exact time periods excludable in computing whether the Government had announced its readiness to try Martinez within six months. The period from April 9, 1975 until the order of removal was entered is clearly excludable under 18 U.S.C. § 3162(h) (1)(F) and Rule 5(f) of the Plan which was in effect in April 1975. Similarly, the period of time between the dismissal of the complaint on July 14, 1975 and the filing of the indictment on August 17, 1976 is excludable. *United States v. McClean*, 528 F.2d 1250, 1258 (2d Cir. 1976); *United States v. Flores*, 501 F.2d 1356, 1359 (2d Cir. 1974).^{*} In addition, periods of delay due to the unavailability of the defendant have always been excluded under the statute and the Plan. 18 U.S.C. § 3161(h)(3), 1976 Plan, Rule 10(a), 1975 Plan, Rule 6(d), 1973 Plan, Rule 5(d).^{**} Martinez was apparently unavailable from

^{*} Martinez's failure to retrieve his bail after the complaint was dismissed hardly makes this time chargeable to the Government. Nothing in *United States v. Cyphers*, 556 F.2d 630, 636 (2d Cir. 1977) or *United States v. Flores*, *supra*, 501 F.2d at 1359-60, suggests that it does.

^{**} The defendant first appeared in the District Court on December 15, 1976. (Transcript of December 15, 1976 conference, p. 3). The conference on that date makes it clear that he had no counsel until that date, though counsel from Chicago had informally contacted the Government. *Id.*

August 19, 1977 until December 15, 1977, when he finally appeared in the Southern District of New York; indeed Judge Werker informed defense counsel that he considered this time excluded under the speedy trial plan since Martinez was without counsel.

Consequently, absent excludable periods the Government permitted approximately 103 days to elapse before filing the notice of readiness. This was clearly within the mandate of Rule 11 requiring the Government to be ready for trial within six months. In light of Judge Werker's statement to defense counsel that he believed the period from August 19, 1977 until December 15, 1977 was excludable, Martinez's attorney's representation can hardly be deemed so woefully inadequate as to make the proceeding a farce because he failed to make a speedy trial motion which the District Court would have inevitably rejected.

Simply stated Martinez's argument is that the failure to move to dismiss an indictment for a possible violation of the speedy trial plan always constitutes ineffective assistance of counsel. This certainly cannot be the law. Rule 11(c) of the Plan sets out sanctions for cases in which the Government is not ready for trial within six months; the defendant may move for dismissal of the indictment, and the court may dismiss with prejudice unless the court finds that the government's neglect is excusable. The language of Rule 11(c) anticipates and provides for cases in which counsel fail to make meritorious speedy trial claims. That rule contains an explicit waiver proposition:

"Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this paragraph."

It would be anomalous for the Court's plan to contain an explicit waiver provision, and for this Court to hold that an attorney who fails to make even a meritorious claim for dismissal under Rule 11(c) has not properly represented his client.

Moreover the failure to raise the speedy trial issue was clearly a tactical decision necessitated by the defendant's desire to advance an alibi defense. See *United States v. Daniels*, 558 F.2d 122 (2d Cir. 1977); *LiPuma v. Commissioner*, *supra*, 560 F.2d at 127. Raising speedy trial claims would have been entirely inconsistent with trial counsel's motion for a continuance on the day of trial. (Tr. 2 *et seq.*). During a conference on the day of trial Martinez's rights to a speedy trial were discussed at length. Martinez wanted a continuance in order to search for certain witnesses he claimed would corroborate his alibi defense.* A speedy trial motion would hardly have aided him in his efforts to get a continuance. On the contrary, it likely would have precipitated an immediate trial.

Indeed, had trial counsel made this speedy trial motion the most he could have hoped for was dismissal of the second count of the indictment. That count covered the transaction of July 1, 1974 which was the only transaction charged in the complaint. Count one of the indictment charged a wholly separate transaction and it was charged for the first time in the indictment. As to that Count the Government's Notice of Readiness was timely filed without any doubt. The failure to raise a motion that would have led at the very most to the dis-

* Martinez's trial counsel declared in the conference on the day of trial that "[w]ith regard to the adjournment, obviously, I think the defendant would have to waive his rights under the Speedy Trial Act and I am offering that as a quid pro quo for seeking the adjournment." (Tr. 7).

missal of only one count can hardly be said to have caused Martinez, who was sentenced to concurrent terms of imprisonment, any prejudice. See *United States v. Cumberbatch*, Dkt. No. 77-1070, slip op. 6031, 6035 & n.3 (2d Cir. September 19, 1977).

Martinez also argues that counsel should have raised the issue of the denial of his Sixth Amendment right to a speedy trial. Such a motion would have inevitably failed. The four factors to be balanced in determining whether the defendant's constitutional right to a speedy trial were violated are: the length of the delay, the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514 (1972). See also *United States v. Lane*, Dkt. No. 77-1082, slip op. 5191, 5194 (2d Cir. Aug. 8, 1977); *United States v. Vispi*, 545 F.2d 328, 333 (2d Cir. 1976). The nine-month post indictment delay was certainly not unduly lengthy. See *United States v. Roberts*, 515 F.2d 642 (2d Cir. 1975). The reason for the delay was clearly attributable to Martinez's failure to appear in the Southern District of New York, to retain an attorney, or to indicate to anyone his inability to afford an attorney. Moreover, his claim of prejudice is that a potential alibi witness had disappeared after his building had burned down. There is no indication that the delay caused by the defendant had anything to do with the witness's disappearance. Indeed, on the day of trial, counsel asked for a two-week adjournment to seek the additional witness. As Judge Werker observed, the defendant had ample time to locate these witnesses—from August 19, 1976 when he was indicted; and no showing has been made to suggest that if the trial had occurred at an earlier time the witness would have been available.

As to the failure to raise these speedy trial claims, Martinez is simply urging this Court to ignore recent admonitions that decisions on whether to make certain

pre-trial motions are "matters of tactics which an appellate court should not attempt to second guess." *United States v. Daniels*, 558 F.2d 122, 126 (2d Cir. 1977); see also *LiPuma v. Commissioner, Department of Corrections*, 560 F.2d 84, 93 (2d Cir. 1977); *United States ex rel. Sabella v. Follette*, 316 F. Supp. 452, 457 (S.D.N.Y. 1970). For example, in *Daniels* the appellant argued that trial counsel's failure to make a speedy trial motion and the failure to request a charge on accomplice testimony constituted denial of his right to effective assistance of counsel. In rejecting this claim, this Court declared that "defense counsel is not required to brief and argue every conceivable argument." *United States v. Daniels, supra*, 558 F.2d at 126.

It is apparent that defense counsel adequately represented Martinez during the pretrial proceedings. The failure to demand a speedy trial—a natural corollary of making a motion to dismiss under the speedy trial plan—was dictated by the defendant's own desire to seek out additional witnesses he apparently told his trial counsel might exist. Trial counsel can hardly be faulted for attempting to gain a continuance in these circumstances.

Martinez also challenges trial counsel's failure to request a cautionary instruction on accomplice testimony, and the failure to object to a portion of the charge on evaluating a witness's testimony. Neither omission on counsel's part amounted to ineffective assistance of counsel. While this Court has held that the District Court should instruct the jury to scrutinize informant testimony with care, *United States v. Swiderski*, 539 F.2d 854, 859-60 (2d Cir. 1976), it has also held that the failure of defense counsel to suggest a charge on scrutinizing accomplice testimony did not constitute ineffective assistance of counsel. *United States v. Daniels, supra*, 558 F.2d at 127.

Furthermore, Judge Werker carefully instructed the jury that they should consider whether a given witness appeared to be honest and whether he seemed to be biased or interested in the outcome. (Tr. 184-85). He also told them that the testimony of Government witnesses is entitled to no greater significance than any other witness and that the same tests of credibility should be applied to those witnesses. (Tr. 186).

Since this was not a case where the Government relied exclusively or even heavily on an informant's testimony a specific jury instruction to scrutinize the informant's testimony with care would have had little, if any, impact on the Government's case. As the Assistant United States Attorney made clear in his summation (Tr. 164), the jury could reject the informant's testimony and the evidence of Martinez's guilt would still be compelling—the undercover agent had testified that on two occasions the defendant had sold cocaine to him, and surveillance agents also made in court identifications corroborating the undercover agent's testimony.

Martinez also attacks trial counsel's failure to object to the following charge:

"Another question for you to have in mind with regard to each witness is whether the story he has told is plausible. Does it ring true or are there inconsistencies in it?

How does it fit in within the other evidence in the case which you do believe and other facts you find to have existed. Does it jibe with that evidence and those facts?" (Tr. 184-85).

He argues that since five Government witnesses placed the defendant at the scene of the crime, and he had but one witness—himself—this charge was prejudicial and trial counsel should have objected. Martinez does not

explain how the charge is legally defective, what objection trial counsel could have made, or how it impermissibly prejudiced the defendant. His argument is simply an acknowledgment of the strength of the proof against Martinez.*

In short, Judge Werker's charge on the credibility of witnesses was unobjectionable. Therefore, there was no reason for Martinez's trial counsel to offer a frivolous objection to the charge.

Finally, Martinez challenges trial counsel's decision not to cross-examine the Government witnesses at length. For two reasons counsel's decision not to engage in extended cross-examination was prudent and sensible. First, the Government called five witnesses linking the defendant to the crimes charged in the indictment. Four of these witnesses were law enforcement agents who undoubtedly had experience testifying. Detailed cross-examination may only have had the unfortunate impact of reiterating and emphasizing their highly incriminating direct testimony. Second, Martinez's alibi defense was discrete and specific. It was not a general defense that the Government had not proven its case or that all its witnesses were fabricating in order to convict an innocent man. Thus, defense counsel sensibly concluded that the best course of action was to establish that each witness

* Martinez also fails to quote a section of the Court's instructions given only moments after the section he complains of. Judge Werker told the jury:

"[t]he weight of the evidence is not necessarily determined by the number of witnesses testifying on either side. You should consider all the facts and circumstances in evidence to determine which of the witnesses are worthy of credence and you may find the testimony of a smaller number of witnesses on one side more credible than the testimony of a great many witnesses on the other side." (Tr. 186).

had a very limited opportunity to see the defendant. (Tr. 64-66, 75, 104, 122-23). Such testimony permitted counsel to make an effective misidentification argument to the jury in order to bolster the defendant's testimony that he was not the person who sold the cocaine. The fact that the argument failed to persuade the jury is simply a testament to the overwhelming nature of the proof against Martinez.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Lee S. Richards being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 19th day of December, 1977,
he served ~~a copy~~ of the within brief by placing the same
in a properly postpaid franked envelope addressed:

Martin Erdmann, Esq.
The Legal Aid Society
Federal Defender Services Unit
509 United States Court house
Foley Square
New York, N.Y. 10007
Attn: Barry Bassis, Esq.

And deponent further says that he sealed the said envelope
and placed the same in the mail box for mailing at One St.
Andrew's Plaza, Borough of Manhattan, City of New York.

Lee S. Richards

Sworn to before me this

19th day of Dec. 1977

Mary L. Arent

MARY L. ARENT
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1979